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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. ~~548~~ 16

ALFRED E. BUTLER,
Appellant,

vs.

STATE OF MICHIGAN,
Appellee.

BRIEF OF JOHN BEN SHEPPERD, ATTORNEY GENERAL OF THE STATE OF TEXAS, AMICUS CURIAE

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The State of Texas, as Amicus Curiae, appearing herein by its Attorney General, John Ben Shepperd, respectfully files this brief in this cause in support of the motion of Appellee, State of Michigan, to dis-

miss the instant appeal because of the importance to the State of Texas of the issues involved and the necessity that the power of the states be preserved where, through the proper exercise of the voice of the people and their legislatures, they prohibit such obscene and lewd books as exemplified by the book in point from circulating across the counters of bookstores and drugstores in an effort to keep such degrading literature out of the hands and minds of all people, especially those of young maturing ages.

Interest of The State of Texas

The State of Texas has a statute [1] similar to that of the State of Michigan which makes it unlawful to "engage in the business of editing, publishing or disseminating any pamphlet, magazine, or any printed paper devoted mainly or purporting to be devoted mainly to the publications of whoring, lechery, assignations, intrigues between men and women and immoral conduct of persons . . . ." There is also a statute [2] which forbids the sale or display of lewd or corruptive comic books.

Statement of The Case

The State of Texas herein adopts the State of Michigan's counterstatement of the case appearing on page 3, of that state's brief on Motion To Dismiss Appeal.

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[1] Art. 527, Tex. Civ. Stat. (Vernon 1948).
[2] Art. 527b, Tex. Civ. Stat. (Vernon 1948).

I.

The States of The United States Are Empowered To Protect Their Citizens From Obscene and Corrupt Publications

The states have consistently been held by the United States Supreme Court to have the power to control and to punish those who abuse the freedom of the press and speech by publications and utterances inimical to the public welfare deeming to corrupt public morals, incite to crime, and disturb the public peace. This was the expression of the Supreme Court in the landmark case of *Gitlow v. New York*, 268 U.S. 652, wherein a state statute of New York forbidding criminal anarchy was attacked as a violation of the 1st and 14th Amendments to the Constitution. In upholding the state statute, the Court spoke as follows:

> "It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom . . ."
>
> "That a state, in the exercise of its police powers, may punish those who abuse this freedom by uttterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question . . ."

Further expressions of the State's power to combat those forces which would undermine the fundamental requirements of decency and which would degrade and pervert the human personalities of both young and old alike is indicated by the later cases of *Near v. Minnisota*, 283 U.S. 697, *Chaplinsky v. New Hampshire*, 315 U.S. 568, and *Winters v. New York*, 333 U.S. 507. The Supreme Court in the Winter's case realized the importance of this and stated as follows:

> "We recognize the importance of the exercise of a state's police power to minimize all incentives to crime, particularly in the field of sanquinary or salacious publications with their stimulation of juvenile delinquency . . ."

It is, therefore, evident that the states, through their legislative bodies, are entitled and expected to protect the welfare of the citizens from those who would corrupt the citizens of the state by hiding behind an interpretation of the United States Constitution which would subvert its very meaning.

II.

The Michigan Statute Is A Valid Exercise of A State's Right To Punish Those Who Sell Books Composed of Obscenities Inimical To The Citizens of The State

The Michigan Statute is an expression of the Legislature of that state which forbids by punishment the sale of those books which are composed of "obscene, immoral, lewd, or lascivious language or de-

scription". The Federal Government and the Legislatures of many states have a similar statute which forbids books which are of such content and caliber as to pervert and corrupt the personalities of people from all walks of life and of every age.

The Michigan Legislature used the above words to describe the offense and then pointed out the effect of such publications as having the effect of inciting minors to violent or depraved, or immoral acts, manifestly tending to the corruption of the morals of the youth. The language identifying the offense in the statute, obscene, lewd, or lascivious, is the same language which the courts of every generation of this country have acknowledged as permissible as a proper exercise of the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people. *Near v. Minnesota*, 283 U.S. 697, 707; *Ex parte Jackson*, 96 U.S. 727; *Chaplinsky v. New Hampshire*, 315 U.S. 568; *Winters v. New York*, 333 U.S. 507.

In the *Chaplinsky* case the Court stated:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."

The Court cited the *Near* case and went on to say that "lewd and obscene" were such descriptive terms. The latest expression of the Supreme Court in the *Winters* case gives direct support. There the Court stated as follows:

"The impossibility of defining the precise line *between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting*—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime —has resulted in three arguments of this case in this Court." (Emphasis added.)

The Court further concluded its opinion as follows:

"To say that a state may not punish by such a vague statute carries no implication that it may not punish circulation of objectionable printed matter, assuming that it is not protected by the principles of the First Amendment, by the use of apt words to describe the prohibited publications. *Section* 1141, *Subsection* 1, *quoted in note* 2, *is an example.* Neither the states nor Congress are prevented by the requirement of specifity from carrying out their duty of eliminating evils to which, in their judgment, such publications give rise." (Emphasis added.)

Therefore, the latest expression of the Supreme Court gives express recognition of the validity of statutes containing the descriptive language embodied in the offense portion of the Michigan Statute.

III.

This Case Presents Facts Which Prevent The Subject Matter From Being Within The Protection of The First Amendment to The United States Constitution

This book is not within the protection of the First Amendment which protects freedom of the press.

There have been various rules and languages used to indicate when a book is such as will warrant a conviction under a charge of obscenity. The Common Law rule was announced in *Queen v. Hicklin*, L.R. 3 Q.B. 360 (1868) as follows:

> "Whether the tendency of the matter charged as obscenity is to disprove and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

This was adopted by many American Jurisdictions but has been discarded by most courts since 1930, when the case of *United States v. First Book Called "Ulysses"*, 72 F. 2d 705 (C.C.A.2d, 1934). Judge Hand noted that the book must be considered as a whole in an effort to balance the story being told with the questionable language used in telling the story.

Regardless of the rule, it is evident from a reading of this book that it is within either rule and is undesirable in such a degree as to warrant bringing

it within the Michigan statute. Such literature as this is not worthy of protection since any possible good is nebulous and of small social value when weighed against the potential responding human depravity of conduct and attitude.

We submit that many communities of our nation are in themselves outspoken enough in their environment in saying that "variety is the spice of life." There are also nations, whom we need not mention, whose complete moral life has become so debase as to cause a collapse of government and business, partly through an acceptance of such literature and its claim of freedom of expression.

Thus, this Court is faced with a contention that freedom of the press is endangered and that our liberty is being threatened.

Certainly this form of expression now before the Court is not part of any truth whose expression would keep us free, but instead would enslave us in a debachery of men and women in their communities and family life.

We feel, as did Lord Kenyon, when, during the French Revolution, he said:[3]

> "The liberty of the press is dear to England. The licentiousness of the press is odious to England. The liberty of it can never be so well protected as by beating down the licentiousness."

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[3] Free Speech in the United States, Chaffee, p. 13.

IV.

This Statute Is Clear and Definite

The Statute before this Court is of such a character that men of common intelligence need not guess at its meaning. *Connally v. General Construction Co.*, 269 U.S. 385.

As set forth in this Statute, in order for the publication to meet the language of the Statute, it must contain obscene, immoral, lewd or lascivious language. The Court held in the *Winters* case that these words are well understood through long usage in the Criminal law. It was in this case that the Supreme Court expressly declared that a part of the New York Statute was a valid and certain statute. This part contains the very words that the Michigan Statute before this Court contains.

The first prerequisite states that the book must contain these descriptive words. It does not read "a book with any obscene language". Although appellant attempts to argue that the word "containing" is nebulous and uncertain, we must realize that all language is a vehicle of communication. If the statute read "a book with such language", there still would be a question as to how much of the book must *contain* the prohibitory language before it could be forbidden.

After setting up these prerequisites, the statute then describes their affect as "tending to incite minors to violent or depraved or immoral acts". This descriptive language manifests the intent of

the Michigan Legislature, wherein they set out the effect of such obscene books. Furthermore, the Legislature went on to say that these types of books "manifestly tend to corrupt the morals of the youth".

It is evident that a book containing obscene and lewd language and an obscene and lewd book are equivalent to each other. Since the Supreme Court has held Statutes similar to the Michigan Statute to be clear and certain and since the Michigan Supreme Court followed this mandate and held the statute valid, this appeal should be dismissed.

CONCLUSION

The States are authorized to prohibit the corruption of the personalities of their citizens by forbidding obscene and debase books from being sold in their respective states. The State of Michigan has enacted a statute in accordance with this power which is certain and definite, indicating what is to be forbidden and also why it is prohibited.

This country was not founded nor was the first amendment adopted by the people of the United States with any idea of protecting publishers and writers in their efforts to enrich themselves through "box office" appeal by pretending to write a "story" and then permeating it with obscenity and lewdness so as to appeal to certain portions of the public who are trained by these writers to respond to such literature as is before this Court.

The people of this Nation are entitled to the protection of their families structures from such efforts as this to attract the attention of young adolescents whereby these writers and publishers *would prostitute man's God-given instinct to be pro-creative in an attempt to line their pockets with this ill-gotten gain.*

We respectfully urge this Court to dismiss this appeal.

Respectfully submitted

.....

JOHN BEN SHEPPERD
Attorney General of Texas

PHILIP SANDERS
Assistant Attorney General

Proof of Service

I, Philip Sanders, Assistant Attorney General of the State of Texas, hereby certify that on the 8th day of May, 1956, I served copies of the foregoing brief on the several parties thereto as follows:

1. On Appellant, Alfred E. Butler, by mailing a copy in a duly addressed envelope to his attorney of record as follows: William G. Comb, Dime Building, Detroit, Michigan.

2. On Appellee, State of Michigan, by mailing a copy in a duly address envelope to its attorneys of record as follows: Thomas M. Kavanagh, Attorney General of the State of Michigan; Edmund E. Shepherd, Solicitor General of the State of Michigan.

PHILIP SANDERS

APPELLANTS

BRIEF

BRIEF ON MERITS

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JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 16

ALFRED E. BUTLER,

Appellant,

vs.

STATE OF MICHIGAN

APPEAL FROM THE RECORDER'S COURT OF THE CITY OF DETROIT, STATE OF MICHIGAN

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IN THE

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October Term, 1956

ALFRED E. BUTLER, *Appellant,* *—against—* STATE OF MICHIGAN, *Appellee.*	No. 16

APPEAL FROM THE RECORDER'S COURT OF THE CITY OF DETROIT, STATE OF MICHIGAN

BRIEF FOR THE APPELLANT

Opinion Below

The only opinion below in the case at bar was that of the trial judge of the Recorder's Court of the City of Detroit, Michigan which was delivered orally at the conclusion of the trial proceedings. It is unreported but appears in the Record at folios 330-333, and in this Brief at pp. 24-26.

Jurisdiction

Appellant appeals from the judgment of the Recorder's Court of the City of Detroit, State of Michigan, entered on the 13th day of July, 1954 (R. 330-333),* convicting

*References are to folios of the printed Record.

him of violating Section 28.575, Michigan Statutes Annotated (Compiled Laws of 1948, as amended by Act 74 of the Public Acts of 1953). He was sentenced to pay a fine of $100 (R. 333). Thereafter, his application for leave to appeal to the Supreme Court of the State of Michigan was denied by that Court on July 14, 1955 (R. 400). Notice of appeal to this Court was filed in the Recorder's Court of the City of Detroit on September 2, 1955 (R. 342-345), and probable jurisdiction was noted by this Court on February 27, 1956 (R. 401).

The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by 28 U. S. C. Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal: *Winters* v. *New York* (1947), 333 U. S. 507; *Burstyn* v. *Wilson* (1952), 343 U. S. 495; *Holmby Productions, Inc. et al.* v. *Vaugham et al.* (Oct. Term, 1955), 76 S. Ct. 117.

Introduction

The Michigan statute which the appellant was convicted of violating makes it a crime to sell, offer or possess for sale a book "containing obscene, immoral, lewd or lascivious language" or "descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." The book involved was "The Devil Rides Outside" by John H. Griffin, published by Pocket Books, Inc. of New York City. In a motion to dismiss made at the outset of the trial and renewed during the course of the trial, the appellant contended that the Michigan statute, upon which the prosecution was based, was an infringement of the rights guaranteed him by the First and Fourteenth Amendments to the Consti-

tution of the United States in that it deprived him of his freedom of press and denied him due process of law (R. 3-5, 211, 235). The motion was based on the same contentions as are herein advanced and which have been persistently but unsuccessfully urged at all stages of the litigation.

After all motions were denied by the trial judge (R. 235), he found the appellant guilty of violating the statute (R. 333). Thereafter, the appellant filed a timely application to the Supreme Court of the State of Michigan for leave to appeal, contending that the said Michigan statute, on its face and as applied, and the judgment of the Recorder's Court predicated thereon, violated his rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States (R. 349-350). Although appellant's application for such leave to appeal was consented to by the People of the State of Michigan on the ground that "the issues involved in this case are of great public interest" and that a "clarification of the language of" the statute was "necessary" (R. 397), the Michigan Supreme Court entered an order on June 14, 1955, denying the appellant's application for leave to appeal (R. 400). Thus, this appeal involves a state court decision which sustained the validity of a state statute against the appellant's objections based on federal constitutional grounds.

In brief, "The Devil Rides Outside" (People's Exhibit 1) is a story written in diary form and in the first person singular. The name of the protagonist is never disclosed although it is apparent that he is a young American musician. The title emanates from an old French proverb to the effect that the devil rides outside monastery walls and the book is divided into two parts, the cloister within, and the

devil without. The first part is prefaced by a quotation from the eminent poet Gerard Manley Hopkins emphasizing man's bewilderment that sin and depravity should be inherent in his nature (R. 86). The second portion of the book is introduced by a quotation from St. Augustine which considers the incomplete nature of man's control over sin and temptation (R. 87).

The book traces the protagonist's growth in the religiously centered life of a Benedictine cloister in southern France and at the same time gives a rather complete and bitter picture of the small-town bourgeois life in the village outside of the monastery walls. It starts with his arrival at the monastery to study Gregorian chants and on the way from the village to the monastery, the bawdy taxicab driver, Salesky, tries to interest him in having one of the girls in the town. However, Salesky's services are refused and the protagonist commences living at the Benedictine monastery intending to return to Paris to take up again with his mistress there. The protagonist, strangely enough, becomes deeply attached to monastic life and ultimately embraces a deep religious faith. He cannot leave, despite bouts with fever and the unendurable cold. Weakened by the pitiful food and the hard life, he goes to live in the village to recover his health while continuing at the monastery his devotions during the day and his study of the manuscripts. He changes from a selfish and arrogant person to one who is seeking wisdom and peace and in the course of his sojourn he becomes tremendously impressed with his father-confessor and with a visiting physician, named Castelar, who apparently symbolizes the happy combination of godliness and manliness in the lay world.

In the period when he is learning to conquer his lusts, he has some earthy and realistically described experiences

with women and he struggles to rid himself of these physical demands and bodily passions. He finally wins out over his baser self by rejecting Madame Renée, his housekeeper and the village's leading matron whose beauty and powerful pride almost engulf him. The book closes with a foreshadowing of his return to the monastic cell after he has won through to sanctity.

Statutes Involved

The sole statute herein involved and the one under which the appellant was convicted, is Section 28.575, Michigan Statutes Annotated (Compiled Laws of 1948, as amended by Act 74 of the Public Acts of 1953), which provides:

> "Any person who shall import, print, publish, sell, possess with intent to sell, design, prepare, loan, give away, distribute or offer for sale, any book, magazine, newspaper, writing, pamphlet, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education or shall buy, procure, receive or have in his possession, any such book, pamphlet, magazine, newspaper, writing, ballad, printed paper, print, picture, drawing, photograph, publication or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be guilty of a misdemeanor."

Questions Presented

The following questions are presented by this appeal. Does the said Michigan statute, on its face and as applied, violate the appellant's rights as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States in that:

(a) its provisions prohibit and punish the publication and distribution of a book to any member of the public because of the effect such book might tend to have merely on minors, thereby unduly limiting and restricting the appellant's constitutional rights of freedom of press, there being neither charge nor proof that the book in question was sold to or possessed by a minor;

(b) it is so vague and indefinite as not to comport with due process because its provisions prohibit and punish the publication and distribution of a book if such book contains matter which tends to incite minors to wrongful conduct and corrupt their morals—a wholly vague criminal proscription, predicated upon unascertainable and indefinite standards of conduct;

(c) its provisions prohibit and punish the publication and distribution of a book merely *containing* certain proscribed language and descriptions, thus precluding any consideration of the entire book as a whole and thereby imposing and enforcing unconstitutionally restrictive limitations on the appellant's freedom of press.

Statement

The case at bar involved the prosecution of the appellant, Butler, for selling, to a police officer, a paper-bound edition

of the book entitled *"The Devil Rides Outside,"* written by John H. Griffin and published by Pocket Books, Inc. of 630 Fifth Avenue, New York City (R. 25). The appellant conceded (R. 28) that he had sold the book in question (People's Exhibit 1) but specifically objected (R. 30-34) to the trial court's admission into evidence of a prepared selection of 101 excerpts from the book which the police officer, Inspector Herbert W. Case, in charge of the Censorship Bureau of the Detroit Police Department (R. 25), testified were "objectionable" (R. 32). In admitting these excerpts (People's Exhibit 2), the court overruled the appellant's contention that a consideration of these portions obviated a judging of the work as a whole (R. 33).

The only sale proven at the trial was the one to Inspector Case, an adult, and after his testimony the People rested (R. 41). The appellant's motion to dismiss, based on the unconstitutionality of the statute and on the weight of the evidence, was thereupon denied (R. 42, 235).

All the defense testimony introduced by the appellant was devoted to establishing that the book, viewed as a whole, was not in any way obscene, lewd, immoral or lascivious, but was a serious work of artistic and literary value. Thus, Harriet Good, Chief of the Book Selection Department of the Detroit Public Library (R. 43), testified that a hard-cover edition of this work (Defendant's Exhibit 1, R. 48, 77), published by Smith's, Inc. of Fort Worth, Texas, had been purchased by the Library and was listed there in the home reading department (R. 44). She stated, however, that "there were certain scenes and incidents in it that were for adult readers only and on that basis, we restricted its use for young people" (R. 57). The witness explained the Library's interpretation of the term "restricted use" (R. 48):

"It is the judgment of the persons involved, that the book has literary value. It should be represented in the Public Library. However, it should not be promoted.

"We consider books placed on the open shelf as books which we are willing to say we promote. The closed shelf of materials are available to adults who ask for them, and they are not placed freely for accessibility for any one at all, there is restricted use."

Freeman Lewis, the Executive Vice President of Pocket Books, Inc., the publisher of the reprint edition of the book (R. 61), testified that the work had been placed on sale in the month of March, 1954 (R. 62) and nationally distributed throughout the country without any stimulating promotion campaign to promote its sale (R. 66, 71-72). It was merely distributed through a system of independent wholesalers in the various states (R. 70-72).

The defense then called Professor Sculley Bradley, a Professor of English at the University of Pennsylvania and Chairman of that institution's Department of American Civilization (R. 78). Professor Bradley had been associated with the University for 34 years, was one of its graduates and was awarded its M.A. and Ph.D. degrees (R. 78-79). He had also served as a visiting Professor at Northwestern University, Duke University, University of Southern California, and presently was a specialist in American Literature and American Civilization (R. 79). The witness was the author of several biographies and a number of historical critical works and was Assistant Literary Editor of the Philadelphia Press from 1931 to 1933 (R. 80). He had also extensively reviewed books for many newspapers and magazines includ-

ing the Chicago Tribune, the New York Times, the Saturday Review of Literature and Harper's (R. 81).

Professor Bradley testified that he read "The Devil Rides Outside" and formed an opinion as to its literary value and artistic merit (R. 82-83). In giving his opinion of the literary value of the work Professor Bradley dealt extensively with its characters, themes and plots (R. 84-103) and likened it to the story of the Temptations of St. Augustine (R. 89-90, 102). He pointed out that the writing of this book belonged to "a modern form of writing in which a symbol has been employed, a symbol of action or character has been employed to suggest to the reader more metaphysical and difficult ideas that are associated with it, instead of using an expository method to relate the ideas in philosophical discourse" (R. 91). The book to this witness was a "story of conflicts in a man" which he felt were ultimately resolved "in a very interesting way" (R. 92). Eventually, the protagonist of the story found enough inner strength to resist all of the mundane temptations with "a final assertion of moral will" (R. 102). This climax, he claimed, was "a bit like the final temptation of St. Anthony in its enormous emotional build-up and power" (R. 102).

In summarizing, Professor Bradley stated that he thought the work was "a highly ethical novel" (R. 102) and "a novel with religious implications at every point, and, finally, a novel in which the various scenes and episodes are highly integrated" (R. 102). Viewed as a whole, the book was of "substantial literary merit" (R. 104); the writing was "extraordinarily good" (R. 104) and although as a first novel it contained "irregularities," it also had a "sincerity of purpose" and "power" (R. 104).

Consistently overruling the defense contentions that the work could not fairly or properly be appraised by its seg-

ments, this expert was required, on cross-examination, to answer many questions of Court and counsel concerning realistically drawn, lusty episodes in the work (R. 110, 116, 122, 125, 133-135). In the main, Professor Bradley insisted that he was only able to see the book as a whole, that a particular passage had no existence outside the book and that he was unable to separate the passage from the entire context of the work (R. 117-118, 121). When pressed further, he justified a particular instance as an integral part of the dominant themes or symbolisms of the work (R. 113, 121, 122-4, 131-132, 134). Other cited excerpts, he felt, added "to the literary value of the book" (R. 134) and the detailed descriptions therein were necessary to its style (R. 124). His final colloquy with the trial judge summarized his opinion on these matters (R. 139-140):

> "The Court: You feel then that by the use of well chosen, very descriptive and, let's say, high-sounding phrases, words and phrases, that that takes it out of the obscene, vulgar, immoral class?
>
> "A. I think that has been the experience of literature through the ages. The loftiness of the spirit and the use of the language for lofty purposes, has elevated the commonest of human materials and we can look at the greatest classics of literature and find it true.
>
> "The Court: Do you think that in this book, that it was necessary to describe in detail the sexual experiences of Mr. 'X' and his minute feelings all during those experiences, in order to make it of literary value?
>
> "A. Yes, Your Honor, I do.
>
> "The Court: Why?
>
> "A. Because I feel that the inner intention of this book is to bring the reader, make the reader

familiar with his own soul and his own experience. I think that this book is intended to have what one of our critics called the shock recognition for the reader. I think that the writer understands that we all go about, even shielding ourselves from the conscious recognition of what is present in our minds, present in our instincts, in our inner nature, so that we feel that we are surrendering to evils without ourselves, or we completely shut our eyes to the fact that there may be evil there, and that he has attempted to show us the whole working of the mind and experience of this character, in order that we should recognize ourselves and understand that the grace which he finds and G'Seau and Clement and other clerics are able to show him, is available to every one."

The other literary expert called by the defense was Professor Frank L. Huntley, Associate Professor of English of the University of Michigan (R. 144-145). Professor Huntley had taught the undergraduate body a general course on English and American literature and was a member of the Hopwood Committee of the University of Michigan "which has the responsibility of encouraging young writers" (R. 147). After reading "The Devil Rides Outside" (R. 147), he formed an opinion about the work which he asserted did not differ from Professor Bradley's (R. 148-149). Viewing the book as a whole and considering its dominant themes (R. 153), Huntley concluded that the work portrayed the age old problem (R. 155): "The devil is outside of us, the devil is inside of us. We are part animal and part angel." The witness found that the book had "substantial literary merit" (R. 153), and that the ultimate conflict was resolved in a "moral" and "religious" way (R. 157).

In a fashion similar to the cross-examination of Professor Bradley, Huntley's attention was also mandatorily directed to the excerpts from the book. With respect to particularly vivid and realistically written passages referred to by the prosecutor, the following colloquy, over objection, occurred in cross-examination (R. 163):

> "Q. * * * Now, do you feel that this book, People's Exhibit 1, a copy of which you have in your hand, would still be of great literary value if all the pornographic details were omitted?
>
> "A. No. Given this conflict as we have attempted to analyze it, it's like a conflict between A and B and you are taking A away.
>
> "Q. You feel then that it is necessary in a good literary treatment of the work, to include every detail of the sex act as is depicted there, do you?
>
> "A. I believe firmly that it is part of the structure, the spirit and the tempo, the color of the whole work. Here again, may I add——
>
> "Q. Go ahead.
>
> "A. ——that the intention of the author is called in question***".

Again, when asked, over objection, if he considered these passages offensive when taken alone, Professor Huntley answered (R. 167-168):

> "A. Taken alone. I find it difficult to say yes or no to that question. I find it impossible to answer it without an analogy. Let's say, take a statue: then let's concentrate just on the navel. The human umbilicus is not a beautiful object, but just take that. Is this apart from its intention, apart from the whole in which we find it, is this beautiful? I would say no.

"Q. In other words, Professor, tell me this, if I am correct. Is it your opinion that the work taken as a whole is a literary work, but that if you should select the excerpts which some people feel are obscene, lewd, lascivious and immoral, that in and of themselves, separate and distinct from the work as a whole, they could and should be classed in the lewd, lascivious and immoral classification?

"The Court: Or any of them?

"A. Well, I would, I think I would have to grant that, Mr. Kent, though I call it a perversion. * * *. Yes, it would be a perversion on the part of the reader to make such selections as I think it would be a perversion on the part of a person looking at a statue, simply to concentrate on the navel and nothing else, and then say this is not beautiful."

John H. Griffin, the author of the work (R. 173), testified concerning the many years he had spent in France, as a student and as a musicologist (R. 174-185). After service in World War II which left him blind and severely crippled, he became absorbed in studying the Benedictine chant in the monasteries throughout Europe where he did advanced research (R. 182-184). As a result of his studies in the French monasteries, many of which were in the rural parts of France, he developed a familiarity with monastic life, the manner in which the monks lived, their prayers and musical studies and the customs and mores of Gallic country sections (R. 185, 193). In 1951 he became a member of the Carmelite Order (R. 191) and a year or so thereafter he wrote this work, his first published novel, which took about seven or eight months to complete (R. 188, 192). He is also the author of other works on technical subjects, primarily, musicology (R. 186-187).

Turning to the work itself, the witness stated that while the book was not "autobiographical" (R. 192), he had "met most of those characters many hundreds of times" (R. 193). When questioned as to his purpose in writing the book, the author referred (R. 200) to one particular passage in the book that distilled his point of view and which appears on pages 196 and 197 of People's Exhibit 1, as follows:

> "And over and above, we are offered the freedom of choice. God, they say, gives us the freedom to choose. But this is a thing of the mind; these qualities of the outside are things of the mind. Can they legitimately be ugly, or even delusions? Can there be freedom of choice when the emotion, not the mind, has the thirsts? And aren't all these things tempered within us to a point where man lives his outside life with no need for consistency of ideal? Are not the smells of wet flesh, the comfort alternating with discomfort, the street sounds, the healthfulness of licentiousness to warm blood, the wonder of our miracle of livingness, enough? There's no freedom to choose until other knowledges insinuate themselves into the heart and the emotions, until other knowledges become other thirsts not to be denied. Then, and only then, can a choice be made.
>
> "Return to the inside, to our poor cloister and its world of the interior, its second portion of every man: the fog-filled interior known as man's health of soul. It too is a thing of the mind not yet ready to become a choice. Instead of riches we seek poverty, instead of the reeling insides we seek chastity, instead of sources of pride we seek sources of humility. But these aren't the end, as are wealth and success on the outside. They are the means to an end—the end being the destruction of all obstacles standing between us and the love of our life, which is God.

"Immutable standards of interior criteria. The paradox of destroying individuality to become whole, of forming the irreplaceable link of a chain knowing that that chain makes of us a portion of living time; knowing it will go on forever with our pinpoint of breathing as one of its links. It isn't done for self but for the many, and for God. And it creates a rapture within that grows into completeness.

"Two pictures, and a choice. The one which most of us know is brightly colored—brilliant, splashing—and satisfying to every cell of the human body. And over its hues death throws the shroud of an undetermined end. The other picture, the one within, is rather the color of the sun, white; the source of all colors before it is passed through the spectroscope and divided. It consumes the satisfaction of each cell of the body, so that the heat of many colors may become the Source of heat; burning the spirit into such a bliss as man may never know, but which, if we believe, is filtered through to us here on earth. It must not be contemplated lightly, for we shall never recover from it once it has seared us within. And the struggle is brief, for its fire becomes a process inside: first a cleansing process, and then the curing of the intangible maladies of reserve and modesty, and with them the stinginess of our desire to remain individual unto ourselves . . ."

Griffin admitted that passages and some of the language in the work were realistically blunt, often gross (R. 201), but pointed out that his whole thesis was to "show the degradation" to which "the complete following of these impulses" leads (R. 204). The incorporation of this type of material was symbolical—"it symbolized all misuse of virtue, of the gift of God" (R. 204). Moreover,

some of the realistic and blunt language that was used was spoken "in the idiom of the countryside" (R. 205).

On cross-examination, Griffin stated that the sex act was chosen as a symbol of all sins that are prevalent in the world because it "is an aspect of life that is universal." (R. 208). Thus, he testified (R. 208):

> "Q. Mr. Griffin, did you feel that the intimate details of the sex act were necessary for a consummation of the good literary style?
>
> "A. I felt that from the viewpoint of what I was aiming at, and from the viewpoint of artistic integrity, that by some absolute, they were necessary and justified."

In the course of his testimony, the author disclosed that the book had four or five editions (R. 208-209). While there were some differences between the Smith's hard-cover edition which the Detroit Public Library had on its "restricted shelf" (Defendant's Exhibit 1), and the Pocket Book edition (People's Exhibit 1) involved in this prosecution, these concerned changes of spelling, errors in nomenclature, punctuation, the use of exclamation marks and italics, and one scene deleted which showed that a priest might be breaking the seal of the Confession (R. 210-212). The reason for these changes was that Smith's made changes in the first manuscript which the author did not know about and he insisted upon eliminating most of these changes from the Pocket Book edition (R. 210-212, 223-225, 232).

At the conclusion of Griffin's testimony, the defense rested (R. 233) and all motions made at the opening of the case were again renewed by the defense in addition to a motion that the proof did not establish beyond a reasonable doubt the appellant's guilt of the charge (R. 235). The

Court at this time denied all of these motions and held that the statute was constitutional and not in violation of the First and Fourteenth Amendments of the United States Constitution (R. 235).

In rebuttal, the People called Rabbi Morris Adler who received the degree of Rabbi and Master of Hebrew Literature at the Jewish Theological Seminary of New York (R. 241-242) and also completed graduate courses in literature at Columbia University and City College of New York (R. 242). The Rabbi further indicated that a good deal of his work in his Congregation in Detroit was with the young people of that organization (R. 242). The witness testified that he read the book "fully and completely" (R. 242) and that he formed an opinion as to its literary value (R. 244). The next line of questioning was put to the witness by the Court and over the appellant's objection (R. 245-246):

> "* * * So, I am going to ask you again, Rabbi, if you feel that some of the material in there is justified by the literary value of the book, can you answer that?
> "A. That's a very difficult question, your Honor. I'd like to explain my position instead of saying yes or no.
>
> "The Court: Very well.
>
> * * *
>
> "A. Your Honor, my feeling is that this is a serious book, that this was written by a man with a talent for writing, and I think with a serious purpose in his mind. And I, for one, would not be too much concerned about the corruption of the morals of any one who read this book from a literary point of view out from his interest in literature. What I am afraid of is that somehow, word gets around about certain passages that are not read in connection

with the entire book, and that would constitute, of course, a different kind of effect. I am persuaded that this is a book of literary merit, and that the man who wrote it was seriously interested in the picking [depicting] an area of life which concerned him.

"The Court: Well, what about the obscene passages?

"A. I think that if they are read by people who have no interest in literature as such, or in the description of character and background that are found in the book, but simply to seek out these passages, there are passages that are exceedingly stimulating and which taken together with other influences in the lives of young people, may have a corrupting influence.

"The Court: May have a tendency?

"A. May have a tendency to corrupt, yes sir."

The next witness in rebuttal was Father Henry Villerot, a priest connected with the Blessed Sacrament Cathedral in Detroit who stated that he had a Bachelor of Arts degree from a parochial college and that he had never done any graduate work in literature (R. 247-248). The witness had never taught literature (R. 248) or reviewed any books for literary journals, newspapers or magazines (R. 251) but had done some work with a Catholic Church Committee to "clean up the literature both in comic and pocketbook form and even in magazine form on the stands around the city or the diocese of Detroit" (R. 249). The Court ruled, nevertheless, that the witness was qualified as a literary expert (R. 254) and Father Villerot was permitted to give his opinion concerning the work. His statement was as follows (R. 255):

"As far as the literary work, it definitely falls into a present classification, modern literature, and certainly has merit in that particular field insofar as I might say, the proper telling of the story that the author intends and his description, and that's what I would say in regard to it on a literary basis."

Again, over defense objection, we have his further testimony, prompted by the Court and subsequently elicited by the prosecution (R. 255-256):

"The Court: Let me ask you this, without going into any expert. Would the parts in there that were not to your liking, or not moral, or lewd, lascivious or obscene, would the purpose of the author in your mind, have justified the inclusion of those parts in that book, and you may have an objection to that, and I am going to take the Father's answer.

"A. As a literary work, maybe. As a work that should be given to the public for public consumption, no.

"The Court: You think that the literary value of the book would have been impaired at all by removing or changing some of those parts in the book that, well, particularly the vivid description of the, let's call it, sensual rather than sexual act. Do you think the literary value would have been destroyed if some of those were changed?

"A. According to my idea of the literary value, I'd say no.

"Q. (By Mr. Kent) You feel that it was unnecessary to go into the intimate details of the sensual act?

"A. Yes.

> "Q. And that could have been done without destroying whatever literary value there might have been to the book?
>
> "A. I think so, yes."

The People also called Bishop George W. Baber, Presiding Bishop of the African Methodist Episcopalian Church (R. 264) who received a Bachelor of Divinity Degree at Wilburforce University and "shopped about" (R. 265) for his graduate studies, attending "refresher courses and seminaries and so forth and so on" (R. 265). His only study in the field of literature was a "general survey" but he engaged in reading as "a constant avocation" (R. 265). He had never been asked to pass an opinion on the literary value of any book and had never taught any literary subjects (R. 266). The only remote connection he had with the literary field was that he "censored pictures * * * by invitation through the Council of Churches in Detroit" (R. 266). Despite objection by the defense as to his qualifications, the Court ruled that he was qualified as a literary expert and permitted him to testify as to his opinion of the literary value of the book (R. 268). He gave as his opinion (R. 268).

> "A. I think it is typical of current realistic literature, and it has value, it indicates that the writer has a good mind and pursued his subject. When I say 'good mind' I mean a good background of training, and he pursued his subject in an interesting fashion."

He further stated, however, that the descriptive emphasis on the sensual was unnecessary to the work (R. 269-270).

The next witness was Mildred Seitz, a Detroit housewife who received a Bachelor of Arts degree at the University of Missouri (R. 274) and had recently done some sub-

stitute teaching in the Detroit schools (R. 282-283) on American and English literature. The witness was President of the National Council of Catholic Women (R. 276) and gave her opinion of the work as follows (R. 276-277):

> "I think the book contains merit in this way. It is very graphically descriptive. It is built like the average modern novel, it has tremendous rises and fall of climax, both in description and in actual recounting of events."

Over the objection of the defense, the witness also testified that the intimate details of the sex act as depicted in the book detracted from its literary value and that such value would not have been destroyed if these details were omitted (R. 278-279). From her experience as a high school teacher of English she felt that high school students would not be able to appreciate its literary value (R. 281-282). Interestingly enough she disclosed that the Prosecutor sent her some excerpts from the book which contained its sex passages and she studied these before testifying (R. 284-285) and that "thinking about these incidents was so stimulating, that I could scarcely remember the serious tone of the book" (R. 286). The episodes, she explained, "recounted so graphically as they were and so stimulating as they were, obscured the serious purpose of the book" (R. 289).

Another witness, Mrs. Genevieve Lola Schoonover, a graduate of the University of Indiana who had done graduate work at that institution in Latin and English, appeared for the prosecution (R. 290). She was now a housewife and had taught English to groups of business women in Detroit (R. 291) and reviewed books for these groups and for clubs and publishers; reviews which were not written

but orally delivered (R. 291-292). She had read the book in question and stated that "the book has a certain amount of literary value" (R. 292). Over the objection of the appellant (R. 294-295), the Court adduced the witness' personal conclusion that the intimate details of the sex act and sensual passions and desires, as set forth in the excerpts, though "stated in high-sounding phrases" were "not necessary" to the value of the book (R. 295).

On cross-examination, Mrs. Schoonover stated that although the book "has literary merit" (R. 296), the author had confused the conflict of the spirit over the flesh (R. 296-297). She acknowledged also that some sort of emphasis might be required in describing the worldly temptations and that the amount of emphasis that was necessary would be different on the part of different readers (R. 297-298). Griffin, she felt, tried to work out his story "honestly" but that "from the standpoint of a discriminating reader he has not done so" (R. 299). In conclusion, she admitted that the particular passages of philosophy and life in the monastery were "well developed and well done" (R. 302); that there were a number of characters that were "well drawn" (R. 303); that there was an interesting description of scenes in the south of France and that the book gave a vital and stimulating account of life in the monasteries, of the Benedictine monks and their principles (R. 303). On redirect examination, she also acknowledged that the dominant theme of the book was "the conflict between sensuality and right living, the life of the spirit" (R. 303).

Charles Carroll Hollis, an Associate Professor of English Literature at the University of Detroit, was the last witness called by the People in rebuttal (R. 304). The witness did undergraduate work at Marquette University, attended the University of Wisconsin and also St. Louis

University and finished his graduate work at the University of Michigan (R. 304). Professor Hollis had been teaching in the English Department at the University of Detroit since 1938 and reviewed books (R. 305). The witness had read People's Exhibit 1 (R. 305) and stated his opinion that it was a "well-intentioned book that is not completely successful in its literary intentions" (R. 306). Actually, the lack of success, according to Professor Hollis, was the result of the author's "first person narrator technique or device" (R. 307), and that such technique "detracts from the significant theme of the work" (R. 308). When shown a list of the so-called stimulating sex passages of the work (R. 308), the witness could not unequivocally answer the question as to whether or not these passages detracted from the literary value of the work (R. 309). Instead, he said that it was really "difficult to make an answer that really answers my reaction to these passages" (R. 309) and added: "It is not the material in the passages, it is the handling, it is the way in which the passages are treated" (R. 309). In response to the Court's question, he stated that the author could have said "the same thing in another way, without making the book offensive at all" (R. 310). When the Court, over defense objection (R. 309), pressed the witness as to whether "it was necessary for the author to go into such minute description of details in order to carry out this theme of the inner conflict between" the spirit and the flesh (R. 310), the witness stated that he felt that the temptations of the flesh were presented here more for the sensual appetite of the reader (R. 310-311). On redirect examination, the Professor acknowledged that he might recommend the book to his graduate students (R. 319) but, as he explained, he would be cautious about recommending it because some passages in it would arouse the sexual appetites of the students (R. 320).

The rebuttal concluded, the People rested (R. 326). The defense then renewed all the motions previously made as to the unconstitutionality of the statute and the insufficiency of the evidence to warrant a conviction and these were denied by the trial judge (R. 326-328). In finding the appellant guilty of violating the statute, the Court gave the following oral opinion (R. 330-333):

> "In this case, the Detroit Police Department, through its officer, Inspector Herbert Case, arrested the defendant, Alfred E. Butler, for selling a book, namely 'The Devil Rides Outside,' written by John H. Griffin, claimed to be in violation of Section 740.343 of the Compiled Laws of 1948, as amended by Act 74 of the Public Acts of 1953, claiming it to be a book containing obscene, immoral, lewd, lascivious language, or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth. The defendant claims the action should be dismissed because the provisions of the Act under which this case is brought is repugnant to the First and Fourteenth Amendments of the Constitution of the United States, and to the Constitutional provision of the Constitution of the State of Michigan, guaranteeing the right of Free Press.
>
> Now, without reading the various Sections, various Amendments and Sections of the Constitution, I will say that in this connection, the defendant claims that the Statute is vague and indefinite and void because it merits the finding that the book contains obscene, immoral, lewd or lascivious language, without taking into consideration the literary value of the entire book, contending that it was necessary for the author to include in his book the language and descriptions objected to in order to make the book a complete work of art, and that said

language was necessary to show the conflict in the feelings, thought and action of the central figure of the book who remains unnamed, and who is torn between the desires for sexual and sensual pleasures, and the longing for a spiritual life and control over his desires. The defense contends that the language objected to is necessary, because only by the detailed description of his sexual and sensual desires and pleasures could the author show the contrast and the intense conflict raging in the man's soul, and that to change the language or descriptions would ruin or completely impair or greatly impair, rather, the work as a book, the book as a work of art.

The sincere purpose of the author being to vividly portray this intense conflict and the final victory of good over evil.

Now, after reading the book, and after having examined the authorities cited in the briefs of counsel, and after listening to the testimony offered in this case, the Court finds that the Act under which this case is brought is not unconstitutional, as being in violation and repugnant to the First and Fourteenth Amendments of the United States Constitution or against the Section of the Michigan Constitution guaranteeing the right of the Freedom of the Press.

And the Court further finds that the State of Michigan under its police power may secure the health and welfare of its citizens and its youth, and that it had a right to pass the Act in question.

The Court further finds that the language contained in the book is obscene and immoral and lewd and lascivious, and is such that it tends to incite minors to violent or depraved acts, to the corruption of the morals of youth. There is little question as to the sincerity of purpose of the author in writing the book, but such sincerity does not afford him the

privilege or license of violating the law and seek to justify it under the guise of being absolutely necessary in order to maintain the literary value of the book.

There is little question in the mind of the Court that the author, with his beautiful command of the English language, could have portrayed to the reader the conflict within this individual, without setting forth in detail the intimate acts and lustful feelings in obscene, immoral, lewd and lascivious language, contrary to our Statute.

Now, in that connection, I've listened to the experts called by both sides and I am not convinced that that part of the book dealing with the sexual acts and pleasures of the author was necessary, even treating the book as a whole. However, the Court does have to find that it is in violation of this particular Statute because the Statute does say that it is sufficient to contain lewd, immoral, obscene and lascivious language or description.

So that if, therefore, if there ever is a review of my decision in this matter, I am not trying in any way to evade the issue; I am trying to follow the Statute as it is. So, I am holding that the defendant is guilty because he sold a book in the City of Detroit containing this language, and also because the Court feels that even viewing the book as a whole, it was not necessary to the proper development of the theme of the book nor of the conflict expressed therein.

Therefore, the Court finds the defendant guilty of the charge and orders him to pay a fine in the amount of $100."

The appellant's motion for a new trial, again based on the deprivation of his rights and privileges under the First and Fourteenth Amendments to the Constitution of the

United States and on the claim that his guilt of the charge was not sufficiently established, was filed July 20, 1954, and denied on February 24, 1955 by Judge W. McKay Skillman of the Recorder's Court (R. 337-9, 341).

Summary of Argument

The appellant contends that the Michigan Statute upon which his judgment of guilt was predicated, violates the constitutional guarantees of freedom of press and due process of law, inasmuch as its provisions plainly prohibit the circulation of any book which *contains* any obscenity of the type which tends to "incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."

Thus, if any book has in it any scene, passage, phrase or word, which by some criteria not set forth in the statute nor otherwise ascertainable, tends to such incitement or corruption, it cannot be sold to any adult in the community. These broad provisions in this statute give rise to three grave constitutional defects which in and of themselves and more extensively in their combined and cumulative effect, enormously and invalidly restrict the appellant's right to sell and distribute literature.

Specifically, the statute is a grossly excessive restriction on the appellant's freedom of press in that it absolutely prohibits and punishes the publication and distribution of a book to any member of the public merely because of the effect such book might tend to have on minors. Moreover, the statute does not just protect the young from works that are obscene, immoral, lewd or lascivious, but specifies that such obscenity must be of the type that tends to "incite minors to violent or depraved or immoral acts, manifestly

tending to the corruption of the morals of youth." Thus, the general concept of obscenity, which courts can and have construed and which the public might be deemed to understand, has been modified and redefined in wholly vague, indefinite and incomprehensible terms. This vagueness and indefiniteness in a criminal statute renders it outside the pale of due process.

Finally, this statute very pointedly provides that if a book merely *contains* such injurious material for the young, it cannot be sold or circulated. This precludes any consideration of the entire book as a whole, its serious purpose and accepted literary value, and permits a trial court, as in the case at bar, to pass judgment on isolated excerpts in the book without regard to the work as a whole or its dominant themes. This unreasonably restrictive limitation on the distribution of a book is, the appellant contends, a patently unconstitutional deprivation of his freedom of press.

ARGUMENT

I

THE MICHIGAN STATUTE AND THE JUDGMENT PREDICATED ON IT PLAINLY AND SERIOUSLY INFRINGE THE FREEDOM OF PRESS AND DUE PROCESS OF LAW GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

The Michigan statute here in question is a criminal statute and as such must be strictly construed. Moreover, its constitutional validity has never been passed upon or even remotely considered by any appellate court in Michigan. Thus, when leave to appeal to the Supreme Court of Michigan was denied (R. 400), despite the prosecutor's concession that "the issues involved in this case are of great

public interest" and that a "clarification of the language of" this statute was "necessary" (R. 397), this statute's questionable constitutional validity escaped any judicial scrutiny except that of the Recorder's Court in the City of Detroit.

The appellant's attack on the unconstitutional aspects of this statute was timely and continuously directed. Before the commencement of the prosecution, these defects of the statute were clearly pointed out in the appellant's motion to dismiss (R. 3-5). Thereafter throughout the course of the trial in motions to dismiss the People's case and the entire case, these same contentions were again advanced (R. 41-42, 235-236, 327-328). Identical arguments were unsuccessfully addressed to the Supreme Court of Michigan and there rejected again when that Court refused to even consider Butler's appeal (R. 349-350, 400).

The Michigan statute now before this Court was given a strict construction by the trial judge who flatly rejected all the constitutional objections raised by the appellant and squarely ruled that its provisions were not in violation of the First and Fourteenth Amendments to the Constitution of the United States (R. 331-332). He also specifically found the language contained in the book to be "obscene and immoral and lewd and lascivious and is such that it tends to incite minors to violent or depraved acts, to the corruption of the morals of youth" (R. 332). In refusing to grant an appeal, the Supreme Court of Michigan either approved this construction of the statute and the rulings thereunder, or avoided any consideration of the problem.

Appellant now contends in this Court that this Michigan statute, on its face and as applied, involves very manifest infringements on his constitutional rights of freedom of press and due process of law. As such it cannot be validly operative and the judgment convicting the appellant, wholly predicated upon its provisions, should be reversed.

A. The freedom of press and due process aspects of statutes restricting the distributing of literature.

The issues involved in this appeal, though emanating from the doctrines enunciated in *Winters* v. *New York* (1947), 333 U. S. 507, 510, have never been squarely presented to or resolved by this Court. They involve crucial aspects of freedom of press and due process as these rights are protected by the First and Fourteenth Amendments to the Constitution of the United States.

There are now quite a number of state statutes similar to the one at bar, punishing and prohibiting publication and distribution of literature "containing" material that is obscene in that it corrupts the morals of youth or tends to incite youths to depraved and immoral acts.* Hence, the constitutional validity of this type of legislation is a most vital problem in the publishing world of today and a serious challenge to the aforesaid constitutional liberties.

Naturally, the appellant concedes that the police power of a state is broad enough to justify legislation prohibiting and punishing the publication and circulation of literature which is obscene, or one of its equivalents, lewd, indecent or lascivious. That point is not involved in the case at bar. However, the *Winters* case expressly suggested that there are limits to the extent to which this Court will permit obscenity statutes to interfere with constitutional freedom of expression, when it said:

> "We recognize the importance of the exercise of a state's police power to minimize all incentives to

*For example: Colorado: Stat. Ann. (1935) ch. 48, sec. 217; Florida: Statutes (1951) sec. 847.01; Iowa: Code (1950) sec. 725.4; Maine: Rev. Stat. (1944) ch. 121, sec. 24; Rhode Island: Gen. Laws (1938) ch. 610, sec. 13; South Carolina: Code (1952) sec. 16-414; Tennessee: Williams Code (1934) sec. 11190; Vermont: Stat. Rev. of 1947, sec. 8490; Virginia: Code (1950) sec. 18-113; West Virginia: Code (1949) sec. 6066.

crime, particularly in the field of sanguinary or salacious publications with their stimulation of juvenile delinquency. Although we are dealing with an aspect of a free press in its relation to public morals, the principles of unrestricted distribution of publications admonish us of the particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution."

Winters v. *New York* (1947), 333 U. S. 507, at p. 510.

It is by now well settled that by virtue of the Fourteenth Amendment, freedom of speech and of the press is secured to all persons against abridgement by a state.

Grosjean v. *American Press Co. Inc.* (1936), 297 U. S. 233, 243;
Lovell v. *Griffin* (1937), 303 U. S. 444, 450;
Schneider v. *State of New Jersey, Town of Irvington* (1939), 308 U. S. 147, 160;
Bridges v. *State of California* (1941), 314 U. S. 252;
Pennekamp v. *Florida* (1946), 328 U. S. 331, 335.

It is, of course, clear that freedom of the press is not limited to newspapers and periodicals but, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion. *Lovell* v. *Griffin* (1937), 303 U. S. 444, 450. Such liberty is protected at every step in the process of creation, publication and circulation, from the writing and imprinting of the work until it reaches the hands of the ultimate reader. As

Mr. Justice Hughes said in the *Lovell* case, *supra,* quoting from *Ex parte Jackson* (1877), 96 U. S. 727, 733:

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."
>
> *Lovell* v. *Griffin,* 303 U. S. 444, 452.

B. Prohibiting the Circulation of a Book to Any Member of the Community on the Ground That It May Tend to Have an Injurious Effect Upon a Minor, Is an Unconstitutional Deprivation of the Appellant's Freedom of Press.

The Statute in clear and unquestioned terms provides, insofar as is herein pertinent, that:

> "Any person who shall * * * sell, * * * distribute or offer for sale, any book, * * * containing obscene, immoral, lewd or lascivious language, * * * or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth, * * * shall be guilty of a misdemeanor."

Thus, from its terms there can be no doubt that if a book contains material which the statute classifies as objectionable for youth, it cannot be sold at all to any adult, or to any library or to any educational institution. The statute does not simply outlaw the distribution of the book to a minor. Instead, it lowers the permissible standard of adult reading to a child's level.

The case at bar particularly highlights this patent invasion of the appellant's constitutional right of freedom of the press because it did not deal with any actual or specifically intended distribution of the book to any minor. It was a Detroit police inspector who bought the book and brought the charge (R. 25-28), though elsewhere, the work

was distributed openly and generally by newsstand sales to the American public at large (R. 70). There was no proof at the trial indicating the probable audience of this book or that it was specially directed to young readers. On the other hand, there was evidence introduced by the appellant that the book was nationally advertised and distributed to the general public and without any special stimulating promotion (R. 66, 71-72).

The appellant does not contest that the state's police power encompasses the protection of the morals of youth. But such power must be properly utilized. If the measures adopted are arbitrary and oppressive, they violate constitutional guarantees. *Treigle* v. *Acme Homestead Assoc.* (1936), 297 U.S. 189, 197; *Liggett Co.* v. *Baldridge* (1928), 278 U.S. 105, 111-112. Here, the proscriptions contained in the statute are such that a vital constitutional freedom is drastically reduced even though no minor may be in any wise involved. Moreover, a book which might corrupt a child in many cases would have no improper influence upon a mature person, yet the Michigan adult cannot read or purchase it. It is patent, therefore, that the statute employs wholly excessive means to combat the evil; legislation which arbitrarily and oppressively infringes on the appellant's freedom of press.

This statute and the many similar ones in other states (*supra*, p. 30) represents a legislative codification of the rule in the old English case of *Queen* v. *Hicklin* (1868), L. R. 3 Q. B. 360, 371, in which Lord Chief Justice Cockburn defined the "test of obscenity", as:

> "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

Most American courts originally followed this rule in construing statutes generally prohibiting the possession or distribution of obscene material. However, by 1935 the doctrine of the *Hicklin* case had been effectively routed, particularly in the federal circuits. Judge Augustus N. Hand, in the celebrated *Ulysses* case, speaking for the Court, said that a book is obscene only if its dominant effect is libidinous, and this decision affirmed Judge Woolsey's District Court opinion which pointed out that the law was concerned only with the "person with average sex instincts." *United States* v. *One Book Entitled "Ulysses"* (S. D. N. Y. 1933), 5 F. Supp. 182, 184, aff'd., 72 F. 2d. 705, 707-708; *Walker* v. *Popenoe* (D. C. Cir. 1945), 148 F. 2d. 511, 512; *United States* v. *Levine* (2d. Cir. 1936), 83 F. 2d. 156, 158.

But while most courts ultimately abandoned the practice of construing obscene literature statutes solely to safeguard the young and the weak, some state legislatures commenced to enact statutes explicitly providing for such protection and which outlawed books tending to corrupt the morals of the young. [See: Lockhart and McClure: *Literature, the Law of Obscenity, and the Constitution.* (1954), 38 Minn. Law Review, pp. 295, 339-340.] In those jurisdictions, and Michigan manifestly is one of them, the modern enlightenment and advance of judicial opinion concerning obscenity is unavailing since the statutes themselves require the courts to apply and enforce this rigid "youth" test even though the interests of the entire adult membership of the community might thereby be sacrificed.

In view of the specific provisions of this Michigan statute, the trial judge in the case at bar had the difficult choice of either declaring it unconstitutional as a violation of the freedom of press or enforcing its precise terms. In upholding the statute and rendering a judgment of conviction, the Court below pointedly found that there was mate-

rial in the book which "tends to incite minors to violent or depraved acts, to the corruption of the morals of youth" (R. 332). Hence, in the protection of the interests of those who might be abnormally susceptible, he was necessarily required to eliminate the interests of those who might have profited from the work.

Of course, the basic question in this aspect of the case is whether the rule of the *Hicklin* case, whether adopted by judicial construction, or enforced by legislative fiat as in Michigan, can ever comport with the constitutional requirement of freedom of press. The appellant squarely contends that it cannot because it operates as a restricted license to publish and distribute only those works which might have no ill effects upon the young. This statutory restriction of adult reading to books wholly acceptable for adolescents is a deep and far reaching invasion of the constitutional right. It cannot possibly be counterbalanced by the claimed safeguarding of the young from the contingent and unpredictable effect a book might have upon them.

C. The Michigan Statute Defines Obscenity in Vague and Indefinite Terms and Hence Its Restrictions on the Sale of Obscene Literature do not Comport with Due Process.

The statute does not simply prohibit the distribution of a book "containing" obscene, immoral, lewd and lascivious language and descriptions. In its provisions the concept of obscenity is unqualifiedly defined as and hinged on the phrase that such obscenity must be of the type "tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." The judgment of the trial court squarely found that sections of the book in question did just that, the opinion stating (R. 332):

> "The Court further finds that the language contained in the book is obscene and immoral and lewd and lascivious, and is such that it tends to incite minors to violent or depraved acts, to the corruption of the morals of youth."

But the appellant contends that this statutory definition of obscenity and lewdness is far too uncertain in its meaning and is not based on any standard of conduct that a person can perceive or to which he can conform.

On several occasions during the examination of the literary experts, testimony was elicited, over the objection of the appellant, that certain realistically written passages in the work might tend to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth (R. 170, 245-246, 256). Obviously, the Court was acting under the wording of the statute and on one occasion so stated (R. 170). However, this procedure inevitably placed the appellant on trial on a criminal charge that was vague and indefinite since there were no standards of conduct, either in the statute, or placed in evidence by the People, which adequately set forth what incited minors to violent or depraved or immoral acts, or what manifestly tended to the corruption of their morals.

The appellant contends, therefore, that such legislation is not sufficiently definite to enable the average member of the public to ascertain what publications are interdicted. A criminal statute, he argues, can not require that every person distributing a book correctly determine whether the work tends to incite youths to violence, immorality or depravity, or whether it would corrupt the morals of minors. Hence, the legislation herein involved is too vague and indefinite to be constitutionally valid. *Winters* v. *New*

York (1947), 333 U. S. 507; *Burstyn* v. *Wilson* (1952), 343 U. S. 495; *Commercial Pictures Corp.* v. *Regents* (1954), 346 U. S. 587; *Gelling* v. *Texas* (1952), 343 U. S. 960; *Holmby Productions Inc. et al.* v. *Vaughan et al.* (Oct. Term, 1955), 76 S. Ct. 117; *Superior Films, Inc.* v. *Department of Education* (1954), 346 U. S. 587.

The *Commercial Pictures Corp.* case, *supra,* makes manifest that this Court, construing the constitutional guarantees of freedom of press and due process, has squarely ruled that the word "immoral" and the phrase "tend to corrupt the morals" in a prohibitory statute or as the basis of an adjudication, are too vague and indefinite to comport with due process of law and operate as an unconstitutional infringement of the freedom of press. In the *Superior Films* case, *supra,* decided as a companion case to the *Commercial Pictures Corp.* case, this Court held void for indefiniteness an Ohio statute allowing the state censors to license the exhibition of motion pictures only if they were "moral," "educational" or "amusing and harmless in character." In the *Burstyn* case, *supra,* the New York statute, authorizing a denial of a license to exhibit a film if the Regents found it to be "sacrilegious," was also held by this Court to be too vague to comport with due process.

Again, most recently, this Court was called on to construe a Kansas statute in the *Holmby Production* case (October Term, 1955) 76 S. Ct. 117. There the state law provided that it was the duty of the license board to refuse to license the exhibition of films which were "cruel, obscene, indecent and immoral or such as to tend to debase or corrupt morals." The board could only approve films which were "moral" and "proper." The particular film in question was denied a license under the terms of the statute, and

this Court in its October 1955 Term, reversed the Kansas Supreme Court in a *per curiam* order merely citing its decisions in the *Burstyn* and *Superior Films* cases.

Any fair appraisal of these precedents, decided in recent years by this Court, makes apparent that state statutes, as in the instant case, which authorize the banning of vehicles of artistic expression on grounds which are vague, indefinite or uncertain, squarely violate the constitutional guarantees of the Fourteenth Amendment, and hence are invalid. On this score surely, there can be no difference between movies and books.

In the case at bar the vagueness and uncertainty of the statute is striking. We are in no wise informed as to what standards guided the trial court in determining that "The Devil Rides Outside" tended to incite minors to the unlawful conduct specified, or to corrupt their morals. The statute itself sets up no criteria on this subject and the only evidence elicited to support the charge that the book did have that tendency, were the blandly expressed opinions of witnesses who were qualified at the trial merely as literary experts (R. 170, 245-246, 256).

D. Because It Prohibits the Distribution of a Book "Containing" Any Obscenity, the Michigan Statute Violates the Constitutional Guarantees of Freedom of Press and Due Process of Law.

A vital defect, apparent on the face of the statute, is that it does not permit a consideration of the work as a whole because it prohibits and punishes the publication and circulation of a book "containing" obscene language and descriptions. The trial itself accentuated the importance of this constitutional defect. Over objection and exception by the appellant, the People's literary expert witnesses were, under the wording of the statute, allowed or directed to pass

judgment on isolated excerpts of the book, taken from their context and treated without regard to the work as a whole or its dominant themes (R. 245-246, 255-256, 294-295). The trial court's ultimate justification for this testimony was the fact that the statute prohibited the sale or distribution of a book "containing" obscene, immoral, lewd or lascivious language or descriptions (R. 332-33).

Although the trial court, acting under the mandate of the statute, found that "The Devil Rides Outside" *contained* obscenity, the judge acknowledged "the sincerity of purpose of the author in writing the book" (R. 332) and "his beautiful command of the English language" (R. 332). All of the People's expert witnesses virtually conceded that the book had literary value or at least was seriously intentioned (R. 245-246, 255, 268, 276-277, 292, 302-303, 306, 323-324). Their principal objection was that the lusty descriptions and language in the work were unnecessary and diminished its literary value (R. 256, 269-270, 278-279, 289, 295) and the trial judge came to the same conclusion in his opinion. However, it should be carefully noted that he made no finding that the book, viewed in its entirety, was obscene. Instead, he merely commented that even "viewing the book as a whole," the excerpted portions were "not necessary to the proper development of the theme of the book nor of the conflict expressed therein" (R. 333). This was nothing more than his opinion as to the artistic necessities and value of some material incorporated in the work.

The precise language of the opinion makes abundantly clear that the trial judge predicated his finding of obscenity solely upon the word "containing" found in the statute. Thus, (R. 332-333):

> "However, the Court does have to find that it is in violation of this particular Statute because the Stat-

ute does say that it is sufficient to contain lewd, immoral, obscene and lascivious language or description.

So that if, therefore, if there ever is a review of my decision in this matter, I am not trying in any way to evade the issue; I am trying to follow the Statute as it is. So, I am holding that the defendant is guilty because he sold a book in the City of Detroit containing this language, and also because the Court feels that even viewing the book as a whole, it was not necessary to the proper development of the theme of the book nor of the conflict expressed therein."

The trial court's comments about the book as a whole were not only dicta which expressed his non-expert opinion of the literary necessities of the style and writing, but were logically invalid. The inclusion of unnecessary language and descriptions could not seriously impair the literary value of the work so long as such material was relevant. The opinion makes no finding or comment about these passages being irrelevant or out of context. It hardly could since all the experts agreed that it was a story devoted to portraying the conflict in man between spiritual advance and the temptations of the flesh. Whether or not the excerpted passages were necessary is essentially a question of degree but they were undoubtedly vitally connected to the dominant theme of the book and hence forcefully relevant.

Nor did the trial judge make any finding or observation that the abundance of these objectionable passages rendered the whole work obscene. This, of course, would be difficult to do since "The Devil Rides Outside" is a work of almost 600 pages, acclaimed by reviewers, and conceded by virtually all of the People's experts to be a serious effort of literary merit (People's Exhibit 1; R. 245-246, 255,

268, 276-277, 292, 302-303). Here again, it is obvious that the prosecution's attack on the book and the application of the statute to it by the trial court were wholly centered on the fact that it *contained* some offensive material.

In the case at bar the Michigan legislature has compelled a court to ban a book because of some of its contents. But those who distribute books in the community would be at a total loss to know how to live by this rule. It would be impossible for a member of the public to determine whether any work, especially an apparently serious and lengthy book, *contains* some isolated proscribed material to be judged out of its context, ripped from the total structure of the work and without consideration of its relationship to the book's theme, literary style or purposes. There is, therefore, a vast area of indefiniteness and uncertainty in the operation and application of this statute and in consequence it necessarily runs afoul of due process of law.

In the case at bar, however, there is a greater requirement for definiteness because this "containing" statute also impinges on the guaranteed constitutional freedom of press. In effect, it obviates a fair consideration of the work as a whole or the dominant purposes of the publication. At present, most federal and state courts in which the question has been considered have explicitly adopted the requirement that a book must be judged as a whole, not by its parts taken out of context. *United States* v. *One Book Entitled "Ulysses"* (2d. Cir. 1934), 72 F. 2d. 705; *United States* v. *Levine* (2d. Cir. 1936), 83 F. 2d. 156; *Parmalee* v. *United States* (D. C. Cir. 1940), 113 F. 2d. 729; *Walker* v. *Popenoe* (D. C. Cir. 1945), 148 F. 2d. 511; *Halsey* v. *N. Y. Society* (1922), 234 N. Y. 1, 4; *Commonwealth* v. *Gordon* (1949), 66 Pa. D. & C. 101, *aff'd. sub. nom. Commonwealth* v. *Feigenbaum* (1950), 166 Pa. Super. 120, 70

A. 2d. 389; *State* v. *Lerner* (Ohio C. P. 1948), 81 N. E. 2d. 282; *New American Library of World Literature* v. *Allen* (N. D. Ohio, E. D. 1953), 114 F. Supp. 823.

In recent cases in both the state and federal courts in Ohio, statutes punishing or prohibiting the circulation of a work "containing" an obscenity, or of "any" obscene nature, were held unconstitutional because in obviating a consideration of the work as a whole, such statutes were too broad an invasion of the freedom of press. *State* v. *Lerner* (1948), 81 N. E. 2d. 282, 285, *supra; New American Library* v. *Allen* (1953), 114 F. Supp. 823, 830-831, *supra.*

This abundance of authority makes manifest that prosecutions against works of literature are constitutionally valid only when the dominant effect of the work has been judged and the book considered as an integrated whole. Hence, statutes, such as the one in the instant case, that authorize a finding of obscenity based only on a part of the work are to that extent unconstitutional, as are judgments of obscenity similarly based.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Recorder's Court of the City of Detroit should be reversed and the Michigan statute herein involved should be declared unconstitutional.

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